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In The Supreme Court Of The United States

OCTOBER TERM, 1954

Nos. 1, 2, 3, & 5

OLIVER BROWN, ET AL., APPELLANTS
v.
BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, ET AL.

HARRY BRIGGS, JR., ET AL., APPELLANTS
v.
R. W. ELLIOTT, ET AL.

DOROTHY E. DAVIS, ET AL., APPELLANTS
v.
COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, ET AL.

FRANCIS B. GEBHART, ET AL., PETITIONERS
v.
ETHEL LOUISE BELTON, ET AL.

BRIEF OF HARRY McMULLAN
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ATTORNEY GENERAL OF NORTH CAROLINA, AMICUS CURIAE

PRELIMINARY STATEMENT

The Attorney General of the State of North Carolina submits this brief as amicus curiae because of the vast importance to the State of North Carolina, and to all of the people of the State, of the decision heretofore announced and of the decrees to be issued by this Court in these cases.

The State of North Carolina is not a party to any of these actions and its Attorney General is not authorized to make it a party thereto or to enter an appearance on its behalf.

As suggested by the Court, with approval of His Excellency, William B. Umstead, Governor of North Carolina, this brief is submitted for the purpose of stating to the Court what, in our opinion, the answers should be to its Questions 4 and 5, set forth in Footnote 13 to its opinion in these cases issued May 17, 1954.

It must be frankly stated at the outset that this brief is not intended to present any solution to the extremely delicate and dangerous problem which has arisen in North Carolina by reason of this Court's decision. It is impossible for the Attorney General to present any plan to this Court for the mixing of the races in the public schools of North Carolina, and such is not the purpose of this brief.

The Kansas and Delaware cases apparently involve no further problems and, thus, there are left for the present consideration of the Court only the decrees to be entered in the cases concerning school boards of Clarendon County, South Carolina, and Prince Edward County, Virginia.

This Court apparently recognizes that in overruling its historic decisions and adopting an entirely new concept of the scope of the Fourteenth Amendment, making necessary a change in the public schools in 17 states including North Carolina and directly affecting the customs and lives of fifty million people, consideration must be given to the impact of this revolutionary pronouncement on the states which heretofore acted upon this Court's former decisions holding that they were entirely within their constitutional power in providing for the separation of the races in their public schools.

This brief is submitted for the purpose of showing the

unparalleled gravity of nullifying the Constitution and laws of North Carolina affecting its most cherished, important, and expensive enterprise, its public schools, and for the purpose of stating sincerely and emphatically that the subsequent decrees of this Court in these cases should allow the greatest possible latitude to the District Judges in conducting subsequent hearings and in drafting final decrees, if any of the objectives sought by this Court's decision are to be attained.

From all information available, an attempt to compel the intermixture of the races in the public schools of North Carolina forthwith would result in such violent opposition as to endanger the continued existence of the schools. It is impossible at this time to foresee what the final results would be even if the Court should recognize the divergent conditions existing in this State and allow sufficient time and ample discretion in the District Judges to frame final decrees after full hearings to meet these conditions. This, however, would seem to be the only way, if any way can be found, which might possibly have the result which the decision of this Court contemplates.

The General Assembly of North Carolina has not convened since this Court handed down its decision on May 17, 1954. What action the General Assembly may take and the final decision of the people of North Carolina may depend upon what ultimate decrees are entered in this Court and in the District Courts. The Attorney General of North Carolina has no authority whatever to say what this action will be or to commit in any way the General Assembly, or the people of North Carolina, to any particular course of action in this grave situation. No other problem has so deeply moved and disturbed the people of the State since the dark days of the early 'sixties.

QUESTIONS PROPOUNDED BY THE COURT

The Court restored these cases to the docket for further argument on Questions 4 and 5 previously propounded by the Court as follows:

"4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

"(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

"(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

"5. On the assumption on which question 4 (a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4 (b),

"(a) should this Court formulate detailed decrees in these cases;

"(b) if so, what specific issues should the decrees reach;

"(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

"(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so, what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?"

SUMMARY OF ARGUMENT

It is submitted that the answer to Question 4 (a) is clearly, "No," and the answer to Question 4 (b) is clearly, "Yes." The answer to Question 5 (a) is "No," which eliminates Questions 5 (b) and 5 (c). The answer to Question 5 (d) is that the judgments in Briggs v. Elliott and in Davis v. County School Board of Prince Edward County, Virginia, should be remanded to the courts of first instance with no instructions except the general instructions set forth in Part III of this brief.

This Court's determination that the state constitutions and statutes before it violate the Fourteenth Amendment does not compel the issuance of a decree "providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice." On the contrary, in our opinion neither this Court nor any other federal court is authorized to issue such a decree.

Section 5 of the Fourteenth Amendment empowers Congress to enact "appropriate legislation" to enforce the amendment, but in the absence of legislation enacted by Congress, whatever may be the case when Congress has spoken, no federal court is authorized to legislate and give to a state or a local school board affirmative directions as to the operation of its public schools. The federal courts may compel a school board to desist from a practice which violates the Fourteenth Amendment, but they may not compel the state, or any of its agencies or subdivisions to do what, in effect, would place the courts in charge of supervising the operation of its public schools.

This Court has decided in these cases that segregation of children (1) in public schools, (2) solely on the basis of race, violates the constitutional rights of children in the minority group. The decision would not reach public schools in which pupils are separated on the basis of sex, on the basis of intelligence or achievement tests, or on any other basis except race, provided only that the basis has a reasonable relation to the proper conduct of the schools or to the preservation of the public peace, morals, health or welfare. It would not, of course, have any application to any state which no longer maintains public schools.

Even if this Court had the authority to require these defendant school boards to permit a Negro child to go to school in whichever building within the district the child selects, a privilege, incidentally, which white children do not have in North Carolina, such a decree would not necessarily follow from the determination that the state constitutions and statutes before the Court are unconstitutional. This Court, in the exercise of its equity powers which the plaintiffs have

invoked, is not required to consider these plaintiffs, and others similarly situated, to the exclusion of others not similarly situated or of others similarly situated but not desiring to attend or send their children to mixed schools. A court of equity may so frame its decree as to preserve both the rights of the plaintiff and the peace of the United States, or of a single state or community. It is not necessary, in order to secure the constitutional rights of the plaintiffs, to subject to grave danger of destruction a public school system painfully evolved through the sacrifices of four successive generations, which acted in reliance upon the interpretation placed upon the Fourteenth Amendment by this Court, by the Congress, and by the courts of last resort in Northern as well as Southern states. Even if it were, this Court may and should stay its hand because of the greater interest of these plaintiffs and all others, whether similarly situated or not, in the maintenance of public schools.

The Court has well said:

> "(B)ecause of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity."

This diversity exists not only between state and state, but also, and to an even more pronounced degree, between regions and communities within a single state. An averaging of the differences between parts of South Carolina approaches in result an averaging of the differences between parts of North Carolina much more closely than conditions in western North Carolina counties approach those in eastern North Carolina counties. If the public schools and the public peace are to be preserved, the decrees to be entered in the South Carolina and Virginia cases must be framed to fit the conditions in the actual communities involved, not to fit the conditions in a non-existent, average community. Only a court conversant with local conditions and granted wide discretion can tailor the decree to fit the local variations.

It may be, as Mr. Justice Jackson suggested during the oral argument of these cases, that to send the cases back to

the lower courts, without standards to guide them in their further proceedings, will mean a generation of litigation. If so, such a result is far preferable to a generation of strife outside the courts and of chaos inside the schoolroom.

The Attorney General of North Carolina and the State Superintendent of Public Instruction prepared and sent a questionnaire to 174 county and city school superintendents throughout North Carolina. Appendix, Exhibit 6. It was designed to ascertain what consequences these men, who know more about the schools of North Carolina than any other group anywhere, anticipate would flow from an attempt to commingle forthwith Negro and white or Indian children in North Carolina schools, within the limits of normal geographic school districting. Each superintendent was asked to give his opinion with reference to his own school unit alone. Of the 165 who expressed opinions, within the time limit set by the transmittal letter (Appendix, Exhibit 6), only 7 believe such an attempt would be accepted peacefully. 145 believe it would seriously impair their conduct of their schools. 124 believe it would cause serious complications in the operation of school busses serving their schools. 135 believe they would have serious difficulty in securing a sufficient number of properly trained white teachers and only 3 believe it would be practicable to use Negro teachers. 148 believe serious problems of discipline would be created. 146 believe extra-curricular activities would be seriously affected. 141 believe parents in large numbers would withdraw their children from the public schools. 138 believe instruction would be seriously impaired by reason of the difference between the average attainments of white and Negro children. 163 are of the opinion that white children will not attend schools heretofore conducted for Negroes, none expressing a contrary opinion. It is a matter of common knowledge in North Carolina that the schools now operated for white children, like those now operated for Negro children, are so crowded it would be a physical impossibility to squeeze any substantial number of Negro children into them, unless a corresponding number of white children either go to the schools presently operated for Negroes or drop out of school.

149 of the superintendents believe a gradual adjustment over a period of time would enable their schools to cope better with the problems flowing from a conversion of the existing school system to one not based on color distinction.

The school superintendents were invited to state in their own words such explanations of their answers to the questions in this questionnaire as they might wish to make. Most of them did so. It may be of interest to the Court to read all of these statements made by those who best know all facets of the school problems in their respective communities. Therefore, these explanatory responses to each question are printed in the Appendix, Exhibit 7.

The Attorney General of North Carolina also prepared and sent another questionnaire to 438 sheriffs and chiefs of police throughout North Carolina. Appendix, Exhibit 8. It was designed to ascertain what these men, who know more about the likelihood of violence in North Carolina than any other group, believe about the likelihood of violence if an attempt were made to commingle forthwith Negro and white children in North Carolina schools within the limits of normal geographic school districting. Each officer was asked to give his opinion with reference to his police jurisdiction alone. Of 198 officers who replied within the time limit fixed by the letter of transmittal (Appendix, Exhibit 8), 191 believe there would be likelihood of violence among racial groups of students which would seriously interfere with the operation of the schools. 189 believe parents, and others not students, would be involved in such violence. 192 believe there would be danger of violence on school busses or at places where children wait for busses. 179 believe their present police forces would not be sufficient to preserve the general peace and order if such an attempt to commingle the children were made forthwith. Only 4 officers out of the 198 who replied believe white parents would permit their children to attend schools in which a substantial number of the students are Negroes, 186 expressing a contrary opinion. 71 believe Negro parents would not permit their children to attend a school in which a substantial number of the students are white. 194 believe racial conflicts would result from the disciplining

of white children by Negro teachers, only 2 expressing a contrary view, and 146 believe such conflicts would result from the discipling of Negro children by white teachers. 172 believe there would be increased danger of malicious destruction of school buildings and school busses. Every officer of the entire 198 who answered believes the majority of the people in his jurisdiction favors segregation.

North Carolina educates more Negroes than any other state in the Union. North Carolina employs more Negro teachers than any other state in the Union. The average Negro teacher in North Carolina has more college training and is better paid than the average white teacher. North Carolina's concern for the education of her Negro children is not a recently acquired concern. North Carolina's public school system is a state-wide system, not a county system. North Carolina has built this system in good faith and in reliance upon this Court's former interpretation of the Fourteenth Amendment. One of the sills upon which the entire structure rests is the belief, still firmly held by the overwhelming majority of North Carolinians, that separate schools for the Negro, Indian and white children are essential to the peace of the state and to the proper education of the children.

The Negro population of North Carolina is not scattered evenly throughout the state, but varies from negligible numbers in western counties to a majority of the total population in nine of the eastern counties. Appendix, Exhibits 1, 2, and 3. In North Carolina's cities, as in cities elsewhere, schools are located so that there will be less commingling of the Negro and white children in the same school building in cities than in rural areas, but most of North Carolina's Negroes and most of North Carolina's white people do not live in cities. North Carolina does not have a population of many racial and sub-racial groups. Practically all of the people of North Carolina are either Negro or Anglo-Saxon.

These are conditions which distinguish North Carolina from other states. These are conditions which must be taken into consideration in formulating any decree intended to apply directly or indirectly to the schools of North Carolina. To

ignore them is to ignore reality and the accumulated experience of four generations. A decree which would cause little or no dissension and confusion in the schools of Kansas may well make effective teaching impossible in North Carolina and may even result in the abandonment of public schools. That which is a mere preference in Illinois or California, may well be a condition precedent to a North Carolina child's going to any school at all.

ARGUMENT

I

A DECREE DIRECTING A SCHOOL BOARD OF A STATE TO ADMIT NEGRO CHILDREN FORTHWITH TO THE SCHOOLS OF THEIR CHOICE WITHIN THE LIMITS OF NORMAL GEOGRAPHIC SCHOOL DISTRICTING WOULD EXCEED THE AUTHORITY OF A FEDERAL COURT.

Courts of the United States may restrain an official or a school board acting under the authority of a state from denying to a Negro child the equal protection of the laws. This Court having determined that segregation in the public schools solely on the basis of race deprives Negro children of the equal protection of the laws, an injunction may properly issue from a federal court directing a state school board to desist from denying a Negro child admission to a public school solely because the child is a Negro, but a federal court may not properly require a state school board to perform affirmative duties or require it to follow procedures prescribed by the court. Such a decree would amount to the supervision by the Court of the actual operation of the public schools.

In the matter of judicial procedures this Court has said:

> "The Federal Constitution does not undertake to control the power of a state to determine by what process legal rights may be asserted, or legal obligations be enforced, provided the method of procedure gives rea-

> sonable notice and affords fair opportunity to be heard before the issues are decided."
> Honeyman v. Hanan, 302 U. S. 375, 58 S. Ct. 273, 82 L. Ed. 312 (1937).

That is, under the Due Process Clause of the Fourteenth Amendment, the federal courts may concern themselves only with the results of state laws and state administrative actions. If those results deprive a person of his life, liberty or property without due process of law, the federal courts may intervene to the extent of requiring the state to change the result, but the procedure or method by which the acceptable result is to be reached is a matter for state, not federal determination.

The same is true of the Equal Protection Clause of the Fourteenth Amendment. Thus, when a Negro had been convicted of a crime by a jury from which members of the Negro race were excluded, pursuant to a systematic, intentional, deliberate and invariable practice to exclude Negroes from juries, this Court reversed the result because the result violated the Equal Protection Clause, but remanded the case to the state court "for proceedings not inconsistent with" this Court's opinion, leaving to the state the choice of a procedure leading to a constitutional result. Patton v. State of Mississippi, 332 U. S. 463, 68 S. Ct. 184, 92 L. Ed. 76 (1948). When a state denied a Negro facilities for a legal education within its borders, this Court reversed the result because the result violated the Equal Protection Clause, but remanded the case to the state court "for further proceedings not inconsistent with" the opinion of this Court, leaving to the state the finding and selection of a new road leading to a constitutional result. State of Missouri v. Canada, 305 U. S. 337, 59 S. Ct. 232, 83 L. Ed. 208 (1938). When, by state action, Negroes were denied the right to vote because of their race, a federal court enjoined the election officials from reaching that result which it said violated the Fourteenth and Fifteenth Amendments, and this Court denied certiorari, but the federal courts did not go further than to enjoin the continued reaching of the unconstitutional result. No master was appointed to supervise future elections. No detailed

decree was issued setting forth procedures to be followed by election officials. The right of the state to adopt and administer election laws so as to reach a different result was not impaired. Rice v. Elmore, 165 F. (2d) 387, Fourth Circuit, 1947, cert. den. 333 U. S. 875, 68 S. Ct. 905, 92 L. Ed. 1151 (1948).

Section 5 of the Fourteenth Amendment empowers the Congress to enforce, by appropriate legislation, the provisions of the amendment. Whether Section 5 authorizes the Congress to enact legislation requiring state school boards forthwith to admit Negro children to the schools of their choice within the limits of normal geographic school districting is not now before the Court. Congress has not so provided. Congress has provided that when a person is deprived by state action of rights guaranteed by the Constitution a federal court may enjoin the reaching of the unconstitutional result, 28 U. S. C. A. 41 (1), but Congress, even if it has the power, has not granted to any federal court the authority to administer the admission of children to schools operated by a state or to control the state in its choice of a procedure leading to a constitutional result.

It is a matter of which judicial notice may be taken that virtually every school building in North Carolina is presently crowded to its physical capacity. If a substantial number of Negro children are admitted to what is now a school crowded with white children, a corresponding number of white children must attend another school or attend no public school at all. Thus, a decree requiring a school board in North Carolina forthwith to admit Negro children to the schools of their choice will, if a substantial number of them choose a school now used by white children, necessarily require the school board to deny to white children presently enrolled in that school the right to continue to attend it. A federal court may now enjoin a state school board from denying admission of Negro children to a specific state school building because of their race alone, but no federal court is authorized to take the assignment of children to specific state school buildings out of the hands of the state school officials and place it in the hands of Negro children.

This Court has decided in these cases that an unconstitutional result is reached when a school board, acting under state authority, denies a Negro child admission (1) to a public school, (2) solely on account of the child's race. There are, however, many ways leading to a different and constitutional result, if after an "agonizing reappraisal" of its public school system the state should determine to continue to operate it. In North Carolina, for example, the result now declared unconstitutional by this Court would not arise if any of the following courses among others should be taken: (1) Assignment of white and Negro children to schools on the basis of residence alone; (2) Segregation of children in schools on the basis of sex, the basis of intelligence tests, the basis of achievement tests, or any other basis except race, provided only that the basis has a reasonable relation to the proper conduct of the schools or to the maintenance of the public safety, morals, health or welfare (See, Hodding Carter, "The Court's Decision and the South," Reader's Digest, September, 1954); (3) Discontinuance of the present state-wide school system and leaving to each county or community the decision as to whether it will have public schools operated on the one or the other of these bases. See, Hodding Carter, "The Court's Decision and the South," supra. It is submitted that the choice to be made between these or other methods leading to a constitutional result is for the State of North Carolina.

II

IF THIS COURT HAS THE AUTHORITY TO ISSUE A DECREE REQUIRING THE ADMISSION FORTHWITH OF NEGRO CHILDREN TO SCHOOLS OF THEIR CHOICE WITHIN THE LIMITS OF NORMAL GEOGRAPHIC SCHOOL DISTRICTING, IT IS NOT REQUIRED TO DO SO, BUT IN THE EXERCISE OF ITS EQUITY POWERS CAN PERMIT A GRADUAL ADJUSTMENT FROM THE EXISTING SCHOOL SYSTEM TO A SYSTEM NOT BASED ON COLOR DISTINCTIONS.

This Court's decision on the merits in these cases gives

rise to a question of equity power for which no precise precedent has been found by the Attorney General of North Carolina, or, apparently, by any of the distinguished counsel representing the parties to these cases. The public schools and resulting social structure of North Carolina, and of at least eleven other states, rest, as a house rests upon a sill, upon this Court's former interpretation of the Fourteenth Amendment, now reversed. If there has been any other judicial decision so affecting fifty million people, that decision has not been found. As the editor of the Saturday Review (October 9, 1954, page 9) has said: "This historic decision cannot be considered apart from the laborious overhaul of a whole social apparatus which it may require." Consequently, the discussion of this Court's equity powers in the formulation of the remedy to be afforded the plaintiffs must proceed from analogies which are exceedingly remote.

The nuisance and anti-trust cases, to which the attention of the Court has previously been directed by the briefs of other counsel, involved huge investments by many people. However, the confusion likely to result from dividing even so vast an enterprise as was the American Tobacco Company pales into insignificance when compared with the uncertainties confronting the people of North Carolina, and other southern states, as a result of the decision on the merits of these cases. Thus, the decrees approved in anti-trust and nuisance cases throw but a flickering light on the problem here. Nevertheless, they do direct attention to the flexibility of equitable remedies and to the fundamental principles which should guide the Chancellor in the exercise of his unusual powers.

In United States v. American Tobacco Company, 221 U. S. 106, 31 S. Ct. 632, 55 L. Ed. 663 (1911) this Court affirmed the finding by the district court that the defendant was an illegal combination in restraint of trade. It did not, however, order its immediate dissolution, pointing out that to do so would endanger the public interest and property rights of innocent persons. The Court said:

> "In view of the considerations we have stated, we leave the matter to the court below to work out a compliance with the law without unnecessary injury to the public or the rights of private property." (p. 188)

In the similar and contemporaneous case of Standard Oil Company v. United States, 221 U. S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1911) the Court likewise instructed the district court to allow a reasonable delay in carrying out the decree of dissolution "in view of the magnitude of the interests involved and their complexity" and "in view of the possible serious injury to result to the public." In Associated Press v. United States, 326 U. S. 1, 65 S. Ct. 1416, 89 L. Ed. 2013 (1945) the Court also recognized that the fashioning of a decree in an anti-trust case is a matter resting largely in the discretion of the Court, saying, "A full exploration of facts is usually necessary in order properly to draw such a decree." In United States v. United States Steel Corporation, 251 U. S. 417, 40 S. Ct. 293, 64 L. Ed. 343 (1920), the Court recognized the propriety of making a distinction in the drafting of a decree between the case of persistent, systematic, lawbreakers masquerading under legal forms, and an organization which the Court found to be a violation of law but also found to have been developed in good faith, saying that in such cases "the public interest is of paramount regard."

In International Salt Company v. United States, 332 U. S. 392, 68 S. Ct. 12, 92 L. Ed. 20 (1947) the Court said with reference to the framing of a decree to compel compliance with the Anti-Trust Act:

> "The framing of decrees should take place in the district rather than in appellate courts. They are vested with large discretion to model their judgments to fit the exigencies of the particular case." (p.400)
> ACCORD: United States v. U. S. Gypsum Co., 340 U. S. 76, 95, 71 S. Ct. 160, 95 L. Ed. 89.

In Alexander v. Hillman, 296 U. S. 222, 56 S. Ct. 204, 80 L. Ed. 192 (1935), this Court said:

> "Treating their established forms as flexible, courts of equity may suit proceedings and remedies to the cir-

> cumstances of cases and formulate them appropriately to safeguard, conveniently to adjudge, and promptly to enforce substantial rights of all parties before them."

In his Equity Jurisprudence, 14th edition, section 28, Story says:

> "But Courts of Equity (as compared with courts of common law) are not so restrained. Although they have prescribed forms of proceeding, the latter are flexible, and may be suited to the different postures of cases. They may adjust their decrees so as to meet most if not all of these exigencies; and they may vary, qualify, restrain, and model the remedy so as to suit it to mutual and adverse claims, controlling equities, and the real and substantial rights of all the parties. Nay, more; they can bring before them all parties interested in the subject matter, and adjust the rights of all, however numerous; whereas Courts of Common Law are compelled to limit their inquiry to the very parties in the litigation before them, although other persons may have the deepest interest in the event of the suit. So that one of the most striking and distinctive features of Courts of Equity is that they can adapt their decrees to all the varieties of circumstances which may arise, and adjust them to all the peculiar rights of all the parties in interest; whereas Courts of Common Law (as we have already seen) are bound down to a fixed and invariable form of judgment in general terms, altogether absolute, for the plaintiff or for the defendant."

Pomeroy emphasizes the same flexibility of equitable remedies and the discretion which the Chancellor may and should exercise in formulating his decrees, saying in section 1338 of the fifth edition:

> "In determining whether an injunction will be issued to protect any right of property, to enforce any obligation or to prevent any wrong, there is one fundamental principle of the utmost importance, which furnishes the answer to any question, the solution to any difficulties which may arise.—The general principle may be stated as follows: Wherever a right exists or is created, by contract, by the ownership of property or otherwise, a violation of that right will be prohibited, *unless there*

> *are other considerations of policy or expediency which forbid a resort to this prohibitive remedy.*" (Emphasis added. See also, Sections 60 and 109.)

Perhaps the statement of these principles most pertinent to these cases is found in a letter from Lord Hardwicke to Lord Kames, quoted by Pomeroy in Section 60 of his treatise. Lord Hardwicke said:

> "Some general rules there ought to be for otherwise the great inconvenience of *jus vagum et incertum* will follow. And yet the Praetor must not be so absolutely and invariably bound by them as the judges are by the rules of the common law. For if he were so bound, the consequences would follow that he must sometimes pronounce decrees which would be materially unjust, since *no rule can be equally just in the application to a whole class of cases that are far from being the same in every circumstance.*" (Emphasis added.)

In United States v. American Tobacco Company, 221 U. S. 106, 31 S. Ct. 632, 55 L. Ed. 663 (1911), the Court found that the defendant was an unlawful combination in violation of the Sherman Anti-Trust Act, but in order not to cause undue hardship to innocent investors it allowed for its dissolution what it believed to be a reasonable time under all of the circumstances. A much longer time will be required to change one of the bases of a social order believed by many millions of people to be necessary to their well being, and which they and their fathers have built in reliance upon an interpretation of the Fourteenth Amendment affirmed and reaffirmed by former decisions of this Court.

In the exercise of its equity powers, which these plaintiffs have invoked, this Court is not required to consider these plaintiffs, and others similarly situated, to the exclusion of others not similarly situated. It may frame its decree so as to preserve both the rights of the plaintiffs and the peace of the United States. These cases, by reason of the numbers of people affected, the nature of the schools involved, and the great variety of local conditions which must be taken into account, are completely distinguishable, as to the appro-

priateness of the remedy, from Sweatt v. Painter, 339 U. S. 629, 70 S. Ct. 848, 94 L. Ed. 1114, Sipuel v. University of Oklahoma, 332 U. S. 631, 68 S. Ct. 299, 92 L. Ed. 247, and McLaurin v. Oklahoma State Regents, 339 U. S. 637, 70 S. Ct. 851, 94 L. Ed. 1149. It is not necessary in order to grant these plaintiffs and others similarly situated their constitutional rights that the public school system of North Carolina be subjected to grave danger of destruction. Even if it were, this Court may and should stay its hand because of the greater interest of the Negroes, Indians and white people of North Carolina, alike, in the maintenance of good public schools.

III

IF THIS COURT HAS THE AUTHORITY TO ISSUE A DECREE REQUIRING THE ADMISSION FORTHWITH OF NEGRO CHILDREN TO SCHOOLS OF THEIR CHOICE WITHIN THE LIMITS OF NORMAL GEOGRAPHIC SCHOOL DISTRICTING, IT SHOULD NOT DO SO, IF SUCH A DECREE IS TO BE A PATTERN TO BE FOLLOWED IN OTHER CASES ARISING IN OTHER STATES AND OTHER SCHOOL DISTRICTS.

In its opinion of May 17, 1954, this Court recognized the variances between the cases now before it and cases which may arise, saying:

> "(B)ecause of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity."

The problems and their complexities are multiplied many times if consideration is given to all the schools of a single state. If all of the states now educating white and Negro children in separate schools are to be brought within the contemplation of the decree, even though they cannot be reached directly by it, the problems and their complexities

become infinite and their solution in a single decree impossible.

The diversity which the Court has recognized exists not only between state and state, but also between regions and communities within each state. Indeed, the differences between parts of a single state are often more pronounced than those between two states, each considered as a whole by averaging the differences to be found within its borders. If the public schools and the public peace are to be preserved for the benefit of the plaintiffs, and others, whether similarly situated or not, the decrees to be entered in the district courts in these cases must be framed to fit the conditions of Clarendon County, South Carolina, and Prince Edward County, Virginia, not some illusory community existing only in the imagination. Only a court conversant with conditions in these counties, including those not shown in the present records before this Court, and granted wide discretion can tailor a decree to fit those conditions.

It may well be true that to remand these cases without undertaking to supply the courts of first instance with specific standards to guide their further proceedings will mean a generation of litigation before an acceptable substitute can be found for the existing school systems in all of the southern states. Mr. Justice Jackson so suggested in the course of the oral argument of these cases at the October Term, 1953. But, standards, which do not fit the conditions in which a decree is to operate, do not guide. They only lead into confusion. Many of our principles of law and of our philosophy of government were hammered out through not one, but many generations of litigation. A generation of litigation is far preferable to the destruction of a social order which is the product of many generations of free men and women striving together for their mutual advancement. A generation of litigation is preferable to a generation of bitterness and strife between neighbors outside of the courts, to a generation of chaos inside the schoolroom, or a generation with no public schools at all.

It is, therefore, suggested that these cases should be remanded to the district courts with directions to frame de-

crees with respect to the admission of the Negro plaintiffs to public schools based upon facts and conditions which may be found to exist at such time. The Court should direct that the district courts should enter no final decrees until further hearings have been conducted and full consideration given to all the many factors which will be involved in adjusting to the revolutionary change in the operation of the public schools which this Court now requires. This would necessarily involve an important time element, available teaching staffs, adequate school buildings and equipment, and compliance with applicable local laws respecting the administration of these public schools as well as all other essential elements constituting the legal and practical aspects of school administration.

IV

A DECREE WHICH MAY BE WORKABLE UNDER CONDITIONS PREVAILING ELSEWHERE MAY HAVE GRAVE AND FAR REACHING CONSEQUENCES IF APPLIED TO THE PUBLIC SCHOOLS OF NORTH CAROLINA.

A.

DIVERSITY BETWEEN NORTH CAROLINA AND OTHER STATES

The diversity in local conditions which this Court has recognized in these cases is of course most pronounced as between southern states and northern and border states, although there is no such thing as a typical southern state in this respect. As has recently been stated in the Saturday Review:

> "The only single Southern attitude—in which he (the Southerner) can find no difference from the rest of the country—is that he wants to live in a white society. It is not this desire that differentiates him from his fellow-Americans, but the peculiar circumstances of his total society, and the hereditary conditioning of his historical

> circumstance. Other sections have never faced the problem of a mixed society. Whenever a community has accumulated a density of colored population the problem has been tacitly evaded by the creation of 'black belts,' as in New York and Chicago. Where individual Negroes formed any sizable percentage of a school, even in the excellent public-school system of New York, families who could afford to immediately moved their children to private schools or moved themselves to suburbs." Clifford Dowdey, A Southerner Looks at the Supreme Court, the Saturday Review, October 9, 1954, page 10.

At least four major differences distinguish North Carolina from most of the states outside the South: The number of Negroes in proportion to white people, the intermixture of white and Negro homes throughout rural areas, the general reaction to this Court's present interpretation of the Fourteenth Amendment, and the number of Negro teachers employed.

No state outside of the South has a population of which as many as 20% are Negroes. See, Appendix, Exhibits 4 and 5. Thirty-five states have populations in which less than 8% are Negroes. Thirteen states have populations in which less than 1% are Negroes. Even if every other condition were precisely the same, the intermixture of one Negro child with 99 white children in North Dakota is obviously a far different problem for a school administrator from the problem of commingling 71 Negro children with 29 white children in Northampton County, North Carolina, or 45 Negro children with 55 white children in Mississippi.

Kansas, whose statute has been held unconstitutional in these cases, has among its population less than one Negro for each 25 persons. This fact alone would make it far easier for the Board of Education in Topeka to commingle white and Negro children than for the school boards in Clarendon County, South Carolina, or Prince Edward County, Virginia, to do so. The disruption of the public schools in Milford, Delaware, as a result of the state's undertaking to commingle eleven Negroes in a formerly white high school, pursuant to this Court's opinion, has become a matter of common knowledge, but in all of Delaware there are only 13 Negroes to

every 87 white people. Even the border states of Kentucky and West Virginia have fewer than one Negro to 13 white people. Thus, even in these two states the commingling of white and Negro children in the public schools presents a far different prob'em from that which would be encountered by the school boards in most counties of North Carolina.

This, however, is not the only difference between the northern and border states on the one hand, and North Carolina, and other southern states on the other hand. The northern states which have the largest Negro populations are New York, Illinois, Pennsylvania, Ohio, Michigan, and New Jersey. In these states the Negro population is almost entirely an urban population. In the North, as in the South, Negroes who live in cities are not scattered throughout those cities but are concentrated principally in certain areas through the natural tendency of people to live in close proximity to other people like themselves. As a result, school district lines can be drawn so that there are relatively few Negro children in certain schools and relatively few white children in other schools. For the residents of those areas, North and South, the problem presented by the opinion of this Court in these cases is largely academic in nature. For most of the people who live in North Carolina the Court's opinion cannot be complied with so easily and, therefore, the questions presented are not academic but are questions, the answers to which must be found in the confusion of people required to change a public school system which is a vital part of their society. This is true because most North Carolinians, white and colored, do not live in cities but live in rural areas where the residences of white and Negro neighbors are interspersed.

A distinction of major significance in this connection between the northern states and North Carolina is that in the northern states the opinion of this Court in these cases was generally approved, whereas in North Carolina the opinion conflicts with deep seated convictions and has been generally regarded as extremely unfortunate. Of course, this Court may not allow its decisions as to the interpretation of the Constitution to be guided by public opinion, but, in deter-

mining the decree to be issued, a court of equity is not required to shut its eyes to reality, especially when the victims of an unwise decree will be children. The experience of our nation, during the period when the Eighteenth Amendment was in effect, demonstrates that a law cannot be successfully enforced by civil authorities when even a substantial minority of the people in a community believe it infringes upon their natural liberties. A court of equity may and should proceed cautiously in formulating a decree which undertakes to require the overwhelming majority of the people in one-third of the Union to change a basic principle upon which their public school systems have been built.

Another important aspect of the problem to be considered in North Carolina is that "the South is the land of opportunity for the Negro teachers." U. S. News and World Report, August 27, 1954, p. 35. North Carolina with very nearly the same Negro population as New York, employs five Negro teachers for every Negro teacher employed by New York. New York with 6 Negroes out of every 100 persons in its population, employs fewer than 2 Negroes for each 100 school teachers. North Carolina, with one Negro out of every 4 persons, employs more than one Negro teacher out of each four teachers. U. S. News and World Report, supra, pp. 36-37.

A distinguished Negro editor has said:

> "No place in the world do Negroes own and control as much as do those in the South. Atlanta is without question the Negro capital of the world. It is the center of Negro culture, education, business, and finance. And both Negroes and whites live, work, and operate business without either being conscious of the other's race.***
>
> "During the past 2 years I have spent more time in the South than I have in my office, and I have interviewed thousands of Negroes in all walks of life and I have found very few who favor mixed schools. They want their own schools, but equal facilities.***
>
> "Despite all of the hullaballoo about the liberal East and North, no Negro has been made head of a State college or university. Down South the woods are full of Negro

college and university presidents. Down in Texas a Negro college president of a State school gets $15,000 a year.

"What Negroes need to refresh their memories on is the fact that just a few years ago we were raising Cain because colored kids in the South were being taught by white teachers. We wanted them taught by Negroes. As Negroes qualified, Negro teachers replaced white teachers until now Negro teachers have completely taken over.

"Not too long ago Negroes went into court and demanded equal facilities in our schools. The courts ruled that they were right. All the Southern States embarked upon a school-building program never heard of before in the history of our Nation. And this effort to give Negroes equal school facilities is an honest one.—

"I have never contended that the South is a utopia, but I do contend that it offers the Negro his greatest opportunity. Last week as I looked at the Negro schools in St. Petersburg and Tampa, Fla., I felt proud of my race. Nowhere in the world do they have more beautiful schools than do the Negroes in Florida, Georgia, North and South Carolina, and the building program is not yet complete." Editor Davis Lee, Newark (N J.) Telegram, as quoted in the Congressional Record, June 11, 1954, pp. A4335-A4336.

With reference to Negro teachers, the U. S. News and World Report of August 27, 1954, also said:

"Negro teachers in the South, thousands of them, are to lose their jobs when segregation ends in public schools. If they are to go on teaching, the North will have to give them jobs. But openings there will be scarce, if present use of Negro teachers is any criterion. It is a problem that causes real concern among school officials. Even in the North, objections often are raised when Negroes are assigned to teach white children." (p. 35.)

128 out of 131 school superintendents in North Carolina believe they would find it impracticable to use Negro teachers in mixed classes. See, Appendix, Exhibits 6 and 7, Question 11. A court of equity in formulating its decree should con-

sider the effect of the decree upon Negro teachers as well as the effect upon Negro pupils.

The diversity of conditions between North Carolina and every other state in the Union, North or South, and between one part of North Carolina and another, cannot be fully presented to this Court without full hearings and litigation directly concerning schools in North Carolina, in which hearings the people of North Carolina have an opportunity to present evidence as to their own sociological, psychological, and educational conditions. However, for the purpose of demonstrating that these differences exist and are so great as to require different implementation of the Court's decision in these cases, a short account of the North Carolina school system and of its development is set forth in this brief. The people of North Carolina, both white and Negro, take a justifiable pride in the public school system which they have created, and have steadily improved, under statutes and administrative practices in conformity to the interpretation of the Fourteenth Amendment approved by this Court for sixty years, and by the Congress and the courts of the states since the Amendment was ratified in 1868.

B.

THE EXISTING NORTH CAROLINA PUBLIC SCHOOL SYSTEM

North Carolina, today, is educating more Negro children and employing more Negro teachers than any other state in the Union. She is educating them in a state-wide school system, which means that, except insofar as local tax supplements provide additional benefits, every child in North Carolina, regardless of race, residence or economic status, studies the same subjects and uses the same textbooks. The length of the school term is the same throughout the State and is the same for white children as for Negro children. This has been so for ten years.

Except where there are local tax supplements in effect, every teacher in North Carolina, having the same training and experience, and engaged in the same type of teaching,

receives the same salary. As a result of this, and of social and economic conditions outside of the schools, the teaching profession offers more financial inducement to highly qualified Negroes than it offers to white men and women of equal qualifications. For this reason the Negro teachers remain in the teaching profession longer, and receive salary increments based on experience. Consequently, the average salary of Negro teachers in North Carolina is greater than the average salary of white teachers in North Carolina, and has been so for ten years, or almost an entire public school generation. As a consequence of the same economic factor, the average Negro teacher in North Carolina has had more college training than has the average white teacher in North Carolina. This advantage in favor of the Negro schools has also existed for several years. Ashmore, The Negro and the Schools, p. 158.

Since the change in North Carolina from diverse county systems of public school education to a state-wide system, small rural schools have been consolidated into large schools, centrally located within the school district. The State furnishes to every child free transportation to and from those schools in state owned and operated school busses. The result of this consolidation program has been the replacement of the small, dilapidated, frame schoolhouse with large, modern, well-equipped, brick school buildings, more adequately staffed with better teachers teaching a more adequate curriculum. The cold biscuit in a paper sack has been replaced by a hot lunch in a well-equipped school cafeteria. The filthy, outside privy has been replaced with sanitary toilet rooms. Expenditures per pupil have increased far beyond the change in price levels. North Carolina today spends on its public schools 3.9% of its total income, being surpassed in this respect by only four other states in the Union, and being far ahead of the states of New York, Massachusetts, Michigan, Illinois, Ohio and Pennsylvania. Ashmore, The Negro and the Schools, pp. 115, 144-145.

C.

THE DEVELOPMENT OF THE NORTH CAROLINA PUBLIC SCHOOL SYSTEM.

This North Carolina school system, in which the Negroes have so great an interest, is not the result of an eleventh hour attempt to comply with the "separate but equal" doctrine approved by this Court in 1896. It is the result of over a century of devotion to and sacrifice for the education of both white and Negro children. It is an achievement of white and Negro neighbors working together in a peaceful, friendly state. It is an achievement in which both the white and Negro people of North Carolina take a justified pride, and which would not have been possible without their adherence to their belief in the doctrine of separate but equal schools.

North Carolina's firm belief that separate schools for the races will train both white and Negro children to live together in mutual respect and friendship, while mixed schools in North Carolina will cause racial conflicts is the result not of emotions and prejudice, but of sober, earnest thought by those who have known and lived in North Carolina, and who have desired to see her children educated so as to be prepared to demonstrate to all the world that two races as fundamentally different as the Anglo-Saxon and the Negro can live side by side in freedom, peace, and mutual respect. Experience has demonstrated the soundness of that belief. There is peace and friendship between white and Negro North Carolinians today which all North Carolinians desire to preserve, and which if properly used by the State Department will, we believe, prove to be a more effective answer to Communism, at home or abroad, than will a decree of this Court which proclaims equality but destroys the conditions precedent to an actual equality of opportunity to learn.

Whether or not this Court is willing to "turn the clock back" and consider the history of public education in North Carolina or the ratification of the Fourteenth Amendment, the attitude of North Carolina on this question can at least be better understood when it is realized that it has a long history of public schools operated on a segregated basis.

North Carolina was the one southern state which had a well-established system of public schools long before the Civil War, and has believed firmly in public education from the earliest days. In its Constitution of 1776, North Carolina provided for schools with salaries of the teachers to be paid by the public. In 1839 the finances of the state were in sufficiently good condition to permit this dream to be realized. Like the schools in the northern states, those established in North Carolina prior to the Civil War were open to white children only. Their establishment and development shows the great interest and faith which the people of North Carolina have had in public education from earliest times. By 1859 the school population of North Carolina was 230,000 and of these children 155,000 were enrolled in the public schools. There were then 2,758 public schools in operation in the state, and the average monthly salary paid to the teachers was higher than in Connecticut, New Hampshire, Ohio, Wisconsin, or Illinois. Knight, Public School Education in North Carolina, page 180. Even in the dark days of 1862, the public school system in North Carolina was maintained and fully 50,000 children were enrolled. Knight, Public School Education in North Carolina, p. 182. Although the fall of the Confederacy resulted in the loss of the Literary Fund, which was the mainstay of the public school system, and, therefore, brought about a temporary disorganization of the school system, the interest of the people of North Carolina in public education continued without abatement and was immediately extended to include the education of the newly freed Negro children.

After North Carolina had rejected the Fourteenth Amendment, its State Government was taken from the hands of her people and reconstituted in accordance with the wishes of the then majority of Congress. As a result, on July 2, 1868, the amendment was ratified in the name of North Carolina by a Legislature so chosen and constituted. On July 2, 1868, Governor Holden recommended its ratification in a message to this Legislature reading as follows:

"Executive Department of North Carolina
Raleigh
July 2, 1868

"Gentlemen of the Senate and House of Representatives:

"Allow me to congratulate you on the auspicious circumstances under which you have assembled. Our heartfelt gratitude is due to Almighty God for the suppression of the Rebellion, the preservation of the Union, the just and liberal principles on which it has been reconstructed, and the assurance that we have a future peace and tranquility. The first business to be performed by the Legislature will be the ratification of the Amendment to the Constitution of the United States, known as the Fourteenth Article, proposed by the Thirty-Ninth Congress. I respectfully recommend the immediate ratification of this Article.

Very respectfully,
W. W. Holden."

The Amendment was ratified the same day. Four months later the same governor wrote to the same Legislature as follows:

"Executive Department
Raleigh
November 17, 1868

"To the Honorable, the General Assembly of North Carolina:

"Gentlemen:

"It is proper that at your first regular session under the new Constitution, I should lay before you 'information on the affairs of the state,' and recommend to your consideration such measures as may be deemed expedient.

"The people of the state have reconstructed their government on the basis of equal rights of all.—

"I recommend, in the most earnest terms, that the General Assembly during its present session provide for a general and uniform system of public schools. *The schools for the white and colored children should be separate,* but in other respects there should be no difference in the character of the schools, or in the provision made to support them.—

"We have indeed a free Republic, in which every man in nearly every state, is fully the equal of every other man in political and civil rights. We have no distinctions founded on color or race, save those which are social in their character, but every one is free under the law to make his own way in life, and to earn a good name for himself and his children. The Union is over us all, states as well as people. There can be no appeal from its authority.—This government is in the hands of its friends and will be administered by them. The government of North Carolina is in the hands of its friends, and of the friends of the national government, and will be administered by them.—

Very respectfully
your obedient servant,
W. W. Holden."

(Emphasis added.)

Thus, the subsequently impeached governor of North Carolina recommended to the Legislature which he called, "the friends of the national government," both that it ratify the Fourteenth Amendment and, after the amendment was ratified, that it set up a system of separate schools for the races. The same Legislature, "the friends of the national government," did both.

In his inaugural address, two days after the Fourteenth Amendment had been ratified by the Legislature pursuant to his recommendation, Governor Holden said:

"It does not follow, nor does the Constitution require, that the white and colored races shall be educated together in the same schools. It is believed to be better for both and more satisfactory to both, that the schools should be distinct and separate."

This Legislature contained 38 Radicals (Republicans) in the Senate and 80 in the House. There were only 12 Conservatives (Democrats) in the Senate and 40 in the House. Knight, Public School Education in North Carolina, p. 231.

Less than two weeks after the amendment had been ratified, the House adopted by a vote of 91 to 2 a resolution proposed by Representative Bowman, Republican Chairman of the Committee on Education, reading as follows:

> "That it is the duty of this and of all future General Assemblies of North Carolina to provide for and continue a system of free public schools for both races, but at the same time to provide that the white and colored children of the state, shall be taught in separate schools." House Journal, 1868, p. 54.

The resolution was adopted by the Senate by vote of 26 to 1. Senate Journal 1868, pp. 237-239.

While Senator Sumner's Civil Rights Bill to compel mixed schools was pending in Congress in 1874, Mr. Alexander McIver, State Superintendent of Public Instruction, was called upon for his opinion as to the probable effects on the public schools in North Carolina if the bill became a law. He replied:

> "No legislation in favor of mixed schools has ever been attempted in this State. Public sentiment on this subject is all one way. Opposition to mixed schools is so strong that if the people are free to choose between mixed schools and no schools, they will prefer the latter. The friends of education would therefore deprecate and most sincerely deplore any congressional legislation which might tend to force mixed schools upon the people." Knight, Public School Education in North Carolina, p. 254.

At the same time Dr. Barnas Sears, General Agent of the Peabody Board, who had resigned the presidency of Brown University in Rhode Island to accept this position, reported to his board on the subject. That board, in 1867, at the time of the establishment of the trust by Mr. Peabody of Massachusetts, included in its membership General Grant, Admiral Farragut, Mr. Hamilton Fish of New York, Mr. George W. Riggs of Washington, Bishop Charles McIlwaine of Ohio, Mr. Robert Winthrop of Massachusetts, and other northern and southern gentlemen equally interested in the welfare of the colored people and the education of all the people in the southern states, the overwhelming majority being from the North. As a result of the board's study of Dr. Sears' report it unanimously adopted in 1874 a resolution reading as follows:

> "The prospects and hopes of the public systems of edu-

> cation in the South will receive a serious, if not fatal blow, from any legislation which should make such systems of education maintainable only upon the scheme of 'mixed schools' as the organization requisite for such public education."
>
> Proceedings of the Peabody Board of Trustees, Volume I, Page 411; Knight, Public School Education in North Carolina, p. 255.

Thus, in North Carolina, while the Fourteenth Amendment was being debated and ratified, and in the years immediately following its adoption, the Carpetbagger, the northern gentleman, the Scalawag and the southern gentleman were in complete agreement on two things: (1) The Fourteenth Amendment did not prevent the state from establishing separate schools for the white children and the Negro children; (2) The establishment and continuation of such separate schools was necessary and desirable.

The overwhelming majority of North Carolinians today, notwithstanding their respect for this Court, are still in agreement on both of those points. Appendix, Exhibits 6, 7 and 8. That is the reason a decree of this Court wholly acceptable, and even welcomed in another state, may well destroy public education in North Carolina.

A Convention to propose amendments to the North Carolina Constitution of 1868 was called by the General Assembly of 1875, pursuant to a referendum vote of the people. The Convention was composed of 120 delegates. The delegates were almost evenly divided between the two major political parties—Democratic and Republican.

The Journal, page 105, shows a resolution was introduced providing that the children of the white and colored races should be taught in separate public schools.

The Journal, page 130, shows that a substitute resolution was offered in the exact language that was afterwards adopted, viz., "and the children of the white race and the children of the colored race shall be taught in separate public schools but there shall be no discrimination in favor of or to the prejudice of either race." The foregoing was offered as an amendment to Article 9, Section 2, of the State Constitution

of 1868 and afterwards in the Convention was known as Ordinance No. 28, and is a part of the present State Constitution.

It is noteworthy that W. T. Faircloth, a delegate from Wayne, and afterwards a Republican Chief Justice of the Supreme Court of North Carolina, and Albion W. Tourgee, a Carpetbagger and Superior Court Judge and a delegate from Guilford County, each voted for the resolution.

The statement is sometimes made that the people of the northern states do not object to the race problem being solved by the southern states, but they want the southern states to start doing something about it. The answer, both in general and so far as schools are concerned, is that North Carolina started doing something about it in 1868 and has continued to do something about it for 86 years. The record of the separate schools of North Carolina in those years is as follows:

PUBLIC SCHOOL ENROLLMENT

(Source: Superintendent of Public Instruction of North Carolina.)

YEAR	WHITE		NEGRO	
	Population of School Age (6-20 years)	Enrolled In Public Schools	Population of School Age (6-20 years)	Enrolled In Public Schools
1874	242,768	119,083	127,192	55,000
1884	314,293	167,059	189,988	111,239
1895	403,812	245,413	217,437	128,150
1905	469,646	325,290	226,976	148,821
1915	540,410	418,902	260,987	187,448
1925	643,572	559,396	297,911	250,438
1935	759,308	616,314	340,490	276,334
1945	717,390	562,621	331,218	250,205
1951	773,003	636,505	345,280	273,272
1952	774,709	641,081	337,827	273,188
1953	792,043	652,622	339,636	276,401

TEACHERS

(Source: Superintendent of Public Instruction of North Carolina.)

YEAR	NUMBER		ENROLLMENT PER TEACHER		AVERAGE ANNUAL SALARY	
	White	Negro	White	Negro	White	Negro
1884	.....	.....	.....	.....	$ 69.58	$ 64.85
1895	.....	.....	.....	.....	75.73	67.19
1905	7,005	2,682	46.4	55.5	148.22	105.10
1915	10,584	3,291	39.6	57.0	285.59	149.66
1925	16,986	5,355	32.9	46.8	835.11	455.41
1935	16,159	6,497	38.1	42.5	620.93	415.31
1945	17,392	7,142	32.4	35.0	1,294.34	1,304.46
1950	19,924	7,567	31.4	35.5	2,535.24	2,628.69
1951	20,560	7,835	31.0	34.9	2,807.74	2,910.26
1952	20,885	8,031	30.7	34.0	.....	.....

HIGH SCHOOL GRADUATES

(Source: Superintendent of Public Instruction of North Carolina.)

YEAR	WHITE	NEGRO
1925	8,246	564
1930	13,457	1,687
1935	18,547	2,826
1940	25,576	4,504
1945	21,981	4,948
1950	24,226	6,259
1951	24,288	6,524
1952	24,930	7,110
1953	26,386	7,848

These accomplishments of a single state's educational program, making use of separate schools for the races, vindicates the wisdom of the agreement reached in 1868 by Carpetbagger, Scalawag, Confederate veteran, and northern phil-

anthropist on the proposition that if there is any slight denial of individual liberty inherent in the separate school system, it is greatly outweighed by the benefits to all the people from a public school system free from racial hatred and strife, and shows that the chief beneficiaries of this system have been the Negro people.

D.

THE FUTURE OF PUBLIC SCHOOLS IN NORTH CAROLINA IF IMMEDIATE INTEGRATION IS DIRECTED BY THE COURT

The people of North Carolina know the value of the public school. They also know the value of a social structure in which two distinct races can live together as separate groups, each proud of its own contribution to that society and recognizing its dependence upon the other group. They are determined, if possible, to educate all of the children of the State. They are also determined to maintain their society as it now exists with separate and distinct racial groups in the North Carolina community. They strongly oppose creating conditions in the public schools which tend to amalgamize the white and Negro races.

This Court has never held that the United States Constitution requires any state to educate any child. Neither has this Court ever held that the education of children must be conducted in schools attended by children of both races. In its opinion of May 17, 1954, this Court said only that segregation of children *in public schools* deprives the children of a minority group of equal educational opportunities, and then only when the segregation is *solely on the basis of race.*

Clearly, justice demands that a state, which has evolved a public school system in conformity to this Court's previous interpretation of the Fourteenth Amendment, and which has in good faith floated bond issues for many millions of dollars and invested the proceeds in school properties, be allowed to choose between constitutional alternatives in calmness and after mature deliberation. A court of equity is not required

to compel such a state forthwith to revamp its entire public school system under the threat of contempt citations, nor is it required to compel such state to select that alternative which the Court might choose.

The Legislature of North Carolina is the only body which can determine the policy to be followed in North Carolina in this matter. There has been no session of the North Carolina Legislature since the opinion of this Court in these cases was issued. Thus, there is no one now authorized to state what method North Carolina will adopt in order to reach its dual objectives of education for every child and maintenance of racial integrity in accordance with the United States Constitution as now interpreted by this Court.

The people of North Carolina firmly believe that the record of North Carolina in the field of education demonstrates the practicability of education of separate races in separate schools. They also believe that the achievements of the Negro people of North Carolina demonstrate that such an educational system has not instilled in them any sense of inferiority which handicaps them in their efforts to make lasting and substantial contributions to their state. A social order which is the product of three centuries, and a public school system which is the product of one century of conformity to the Constitution as interpreted by this Court and by Congress, cannot be transformed overnight into an entirely different social order and educational system notwithstanding the great respect which the people of North Carolina have for constitutional government and for this Court.

At least the following dangers will result in North Carolina from a decree requiring immediate intermixture of white and Negro children in the public schools throughout North Carolina: (1) Public schools may be abolished; (2) If the public schools are not abolished, the presence in the same classroom of white children and Negro children may well bring about daily confusion, physical conflicts, ridicule of one group by another, and other conditions which will make it difficult for children to study and teachers to teach; (3) If public schools are not abolished, parents financially

able to do so may send their children to private schools, and public schools will come to be regarded as a dole to paupers, repulsive to everyone, black or white, having that pride and self respect essential to good citizenship in a democracy; (4) Conflicts in the schoolroom, on the playground, and between parents and teachers may lead to racial bitterness in a community and bring to North Carolina the bloody race riots which have disgraced cities and states where justifiable racial pride among both Negroes and white people has been ignored.

That these are not figments of imagination, but are clear and present dangers is the opinion of the overwhelming majority of North Carolina school superintendents (Appendix, Exhibits 6 and 7) and North Carolina police officers (Appendix, Exhibit 8).

E.

DIVERSE CONDITIONS WITHIN NORTH CAROLINA

(a) *Distribution of Negro Population.*

According to the United States Census of 1950, almost exactly one-fourth of North Carolina's population of 4,061,929 are Negroes. Approximately 30,000 are Indians, for whom the State now maintains schools separate and apart from either the schools for white children or the schools for Negro children. The racial loyalties of the Indians of North Carolina are as strong as those of either of the other races, perhaps stronger. The Indians will be as resentful of any compulsory integration of their children with the children of the other races as will be the people of either the white or the Negro race. The overwhelming majority of the white people of North Carolina are of English or Scotch descent and are native-born North Carolinians. The absence in North Carolina of sizable minorities of white people of non-English origins results in a race consciousness and a race pride among the people of North Carolina much more clearly defined than that to be found in states with large metropolitan areas pop-

ulated by many racial and subracial groups.

However, the one million Negroes and three million white people in North Carolina are not scattered evenly throughout the State. See Appendix, Exhibit 2. In the extreme western part of the State there are relatively few Negroes. The 1950 census shows that Graham County, for example, has 6,665 white residents and only 10 Negroes.* At the other extreme is Northampton County, in the northeastern part of the State, with 18,189 Negroes and only 10,182 white residents. There are nine counties in North Carolina (Northampton, Warren, Hertford, Bertie, Halifax, Hoke, Gates, Edgecombe, and Martin) which have more Negro residents than white residents. Eight of these are contiguous and lie in the northeastern part of the State next to the Virginia border, the ninth (Hoke) being near the South Carolina border in the south central portion of the State. On the other hand, there are twenty-seven counties in the State in which the Negro population is less than 10% of the total. These counties are mountain counties in the far western portion of the State with the exception of Randolph County, in the Piedmont area, and Dare County, on the coast. Twenty-one counties, most of which lie in the Piedmont section, which is the most industrialized part of the State, have Negro populations varying from 10% to 25% of the total, and forty-three counties, lying principally in the east and central portions of the State, have Negro populations varying from 25% to 50% of the total.

While the proportion of Negro children and white children enrolled in the public schools does not follow precisely the division of the total population by counties, obviously the far western counties of North Carolina have very few Negro school children in their schools, the Piedmont counties have more, the eastern and southern counties have even more, and the greatest enrollment of Negro children in the public

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* The census appears to be in error at this point, since inquiry of officials of Graham County discloses that there are no Negroes residing in that county and none have resided there for many years, if ever.

schools occurs in Hoke County and in the eight northeastern counties of Northampton, Warren, Hertford, Bertie, Halifax, Gates, Edgecombe, and Martin.

It is not correct to assume that a county in which there are but a few Negroes will be a county in which there is little race consciousness, or that the county in which there are many Negroes is a county in which there are dangerous racial tensions and antipathies under the present social structure and school organization. The scarcity of Negroes in a given locality may indicate racial antagonisms so deep and severe that the Negroes prefer to live elsewhere. However, it is quite apparent that the intermixing of white children and Negro children in the same schoolroom presents a far different problem in a county where there are 10 Negroes to 6,665 white people from that which it presents in a county in which the two races are equally numerous, or in a county in which there are 18,000 Negroes to 10,000 white people. It could well be that the 10 Negroes in Graham County, for example, might include only one of school age. Granting that the racial loyalties and antipathies are as strong in the one county as in the other, it is obvious that the admission of one Negro child to one of the schools in Graham County would not create the administrative and instructional problems which would arise from an attempt to mix in schools all over Northampton County the children of 18,000 Negroes and 10,000 white people. A decree which would be an annoyance in Graham County could well bring disaster in Northampton.

(b) *Retarded children.*

In North Carolina, as elsewhere, (Report of the Second Regional Conference, State Board of Education and Chief State School Officers, Atlanta, Georgia, September 5-7, 1954, p. 36) achievement tests and intelligence tests taken by the Negro children and the white children in the same counties show the average white child attained a substantially higher rank than the average Negro child, although there were many instances of individual Negroes who showed remarkably superior intellect and equally superior achievement. No doubt, the explanation of this fact is a complex one. It seems

certain that the explanation goes far beyond the schoolroom since, as shown above, the Negro children in North Carolina have been receiving their training in the schools from higher paid teachers than have the white children. Whatever the explanation, the fact remains.

A study of the ages of the children in the North Carolina schools in the year 1949-1950, the last year for which such figures are available shows that in the elementary schools 1.69% of the white children in school were under the normal age for their respective grades, 80.84% were of normal age for their grades, 10.71% were one year over age, 4.47% two years over age, 1.59% three years over age, 0.52% four years over age, and 0.18% five years over age. Among the Negro children, 3.42% were under age, only 62.63% were of normal age, 15.70% were one year over age, 9.18% were two years over age, 4.99% three years over age, 2.45% four years over age, and 1.63% five years over age. Thus, one white child out of six was retarded, as compared with one Negro child out of three. See, State School Facts, published by the North Carolina Department of Public Instruction, January, 1952.

The same study shows that in the high schools 4.31% of the white children were under normal age as compared with 8.82% of the Negroes under normal age. 78.70% of the white children were normal age for their respective grades whereas only 57.87% of the Negro children were of normal age for their respective grades. 11.94% of the white children were one year over age as compared with 18.64% of the Negro children who were one year over age. 3.69% of the white children and 8.89% of the Negro children were two years over age. 1.01% of the white children and 3.94% of the Negro children were three years over age. 0.24% of the white children and 1.31% of the Negro children were four years over age. 0.11% of the white children and 0.53% of the Negro children were five years over age. Thus, in high school also, one white child out of six was retarded as compared with one Negro child out of three.

Obviously, it would create more numerous and more serious administrative and instructional difficulties to put in the

same classrooms with white children the thousands of Negro children in Northampton County, one-third of whom are retarded, than it would cause to put into the classrooms of Graham County a single Negro child or even two Negro children, even if both of them should happen to be in the retarded one-third.

(c) *Urban and Rural Distribution of Negroes.*

Not only are the counties and sections of North Carolina different in the matter of the ratio of the Negro population to the total population, but they also differ in that the eastern half of the State, in which the overwhelming preponderance of the Negro population resides, is predominately an agricultural area. It is in this section primarily that the farming is done by the tenant farming system. In these eastern counties of the State the Negro population is primarily a rural population. Likewise, the white population of these counties is primarily a rural or small town population. In the Piedmont area, with its relatively smaller Negro population, manufacturing is concentrated. Farms, generally, are operated by the owner and his family. The Negro population of these counties tends to concentrate in cities and towns. In Southern cities and towns, just as in the North, residential segregation prevails apart from law. In these cities and towns there are schools now attended separately by white and Negro children. The Negro school building is located in the Negro section of the town. The white school building is located in the white section of the town. Normal geographic school districting will normally result in a continuation of separate schools for the separate races in such a community. There will, of course, be a few families of one race living in an area generally occupied by families of the other race. Most of these may be expected to prefer to cross the district line so as to attend the school they have been attending, and this would not violate any decision heretofore made by this Court. But even if such voluntary crossing of the district line is not permitted, the problem will not be nearly so difficult from an administrative and instructional point of view in cities and towns as it will be in rural communities, because in the cities and towns it will be akin to that in counties with

only a few Negroes. Therefore, the problem of mixing white children and Negro children in the public schools in North Carolina will present a far different problem in the industrial Piedmont area from that presented in the rural, agricultural, eastern half of the State, where the overwhelming majority of North Carolina's one million Negroes live. A decree which would be an irritant in a city could completely disrupt the rural schools of the same county.

F.

THE NORTH CAROLINA SCHOOL BUS SYSTEM

The opinions expressed by school superintendents and police officers (Appendix, Exhibits 6, 7 and 8) indicate that the mixture of the races in school busses is the most difficult problem confronting the school authorities in North Carolina as a result of this Court's opinion of May 17, 1954.

The State of North Carolina in recent years has carried on an intensive program of consolidation of schools for the purpose of improving the quality of the schools and providing a more extensive curriculum. Small rural schools, both elementary and high school, have been merged into large schools, with modern buildings and equipment, offering increased educational advantages to the white and Negro children in rural areas. This has necessitated the transportation of the majority of all the school children in North Carolina by school bus.

The State of North Carolina operates 7,200 public school busses. It transports to and from school each day 452,000 children, which is approximately one-ninth of the total population of the State. Over 6,000 of these busses are driven by high school students. No adult now rides on most of them. Approximately 2,000 are now used for the transportation of Negro children, 5,000 for the transportation of white children, and 85 are used for the transportation of Indian children. Practically every school bus in the State is crowded beyond its normal seating capacity. The busses travel over all kinds of country roads. Children in the first grade and in the high school ride on the same bus. To require that

Negro children and white children be commingled forthwith on these buses, without adult supervision and police protection, is to invite conflicts on the bus, which will make riding on them so hazardous few parents will consent to their children's using them. This is a substantial danger a court of equity may well consider in formulating its decree.

CONCLUSION

The people of North Carolina have evolved a school system which, while far from the goals they have set for it, is an excellent school system. It is a school system in which children, in all parts of North Carolina and of all races, receive substantially equal opportunities for an education preparing them to assume the responsibilities of citizens under a constitutional government. It is a school system for which there is no presently available substitute in North Carolina. If it is destroyed or seriously impaired, generations of children of North Carolina will be severely handicapped, and the Negro children will be the greater losers.

As Mr. Clifford Dowdey, writing in The Saturday Review, said:

> "It is the gradation, the variation of necessary adjustments, which makes the execution of the Court's decision in the South anything except an abstraction on the road to equality. The human conditioning of environments being what it is, and individual circumstances varying as they do, it would look at this moment as if the historic decision might create historic chaos—unless, in October, when the Court listens to representatives of the locally affected scenes, it truly considers the real problems of the Southern society in which the Negro lives. Otherwise there will be a definite roadblock in the Negro's sorrowful journey toward his mortal dignity and full citizenship."
> Clifford Dowdey, The Saturday Review, October 9, 1954, p. 38.

It is respectfully submitted that in view of the good faith with which the people of North Carolina have evolved their

present excellent school system through the sacrifice of four generations, in reliance upon this Court's interpretation of the Fourteenth Amendment, the people of North Carolina are entitled in simple justice and equity to the entry of such a decree in these cases as will not seriously impair or destroy their public schools.

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